



METHODOLOGY ON

**CARRYING OUT MONITORING  
OF JUDGEMENTS ON APPLICATION  
OF THE EUROPEAN CONVENTION  
ON HUMAN RIGHTS  
AND THE CASE-LAW  
OF THE EUROPEAN COURT  
OF HUMAN RIGHTS BY JUDGES  
IN UKRAINE**

## BACKGROUND

The OSCE Project Co-ordinator in Ukraine (the PCU) strengthened the capacity of civil society to monitor the judgements on application of the European Convention on Human Rights (hereinafter referred to as the ECHR) and the case-law of the European Court of Human Rights (hereinafter referred to as the ECtHR) by trained judges within the framework of the Project “Safeguarding Human Rights through Courts” (hereinafter referred to as the Project). The objective of the monitoring of judgements is to review the level of application of the above-mentioned legal instruments by judiciary prior to and after the training intervention. The activities were implemented with engagement of a qualified Ukrainian non-governmental organization, the «Institute of Applied Humanitarian Research», acting as an Implementing Partner (hereinafter referred to as the IP).

To strengthen the capacity of Ukrainian expert civil society to monitor the application of the ECHR and the case-law of the ECtHR by judiciary, and for the purpose of evaluation of the effectiveness of the training intervention, conducted by the PCU during 2014-2016 to strengthen capacity of judiciary in application of the ECHR and the case-law of the ECtHR, the IP was tasked with carrying out monitoring of judgements and conducting an analysis of monitoring findings. The IP was chosen through a competitive selection process.

The objective is to establish a baseline and evaluate the progress made in application of the ECHR and the case-law of the ECtHR by the judges before and after the trainings provided to them within the Project (by reviewing and analysing the judicial decisions through the Unified State Register of Court Judgements) and to identify further training needs.

The IP:

### **1. CARRIED OUT MONITORING OF JUDGEMENTS OF UKRAINIAN JUDGES ON THE EXTENT AND APPROPRIATENESS OF APPLICATION OF THE ECHR AND THE CASE-LAW OF THE ECtHR.**

The IP was tasked to (a) conduct sampling of the judgments passed by the judges who participated in trainings and other educational interventions provided within the Project in 2014-2016; (b) analyse the selected judgements on the extent and appropriateness of application of the ECHR and the case-law of the ECtHR. The IP analysed the judgements passed by the selected judges during the pre-training and post-training period. The results of this analysis will serve as a foundation to establish the difference in application of the ECHR and the case-law of the ECtHR before and after the judges participated in the training/educational interventions.

The IP selected the judgements from the Unified State Register of Court Judgements (<http://www.reyestr.court.gov.ua/>). The main selection criterion for the judgements was that they had to have been passed by one of the judges who participated in the training/educational interventions on application of the ECHR and the case-law of the ECtHR conducted within the Project.

### **2. CONDUCTED ANALYSIS OF THE MONITORING FINDINGS<sup>1</sup>**

The IP provided a thorough analysis of the monitoring findings. The final report on the monitoring findings will be available as of November 2017.

<sup>1</sup> The purpose of this assignment is not to identify errors or omissions in judicial decisions attributable to specific judges, but to establish the general trend vis-à-vis the changes in the application of the ECHR and the case-law of the ECtHR due to the training. Therefore, the analysis of the decisions within the framework of this project cannot be regarded as assessing the performance of individual judges and may not be regarded as an attempt to question or affirm the accuracy of the respective judicial decisions.

THE METHODOLOGY DESCRIBED BELOW WAS DEVELOPED  
BY THE IP IN COOPERATION WITH THE OSCE PCU.

This Methodology was developed based on the conceptual provisions and organizational requirements set forth in the Project's Terms of Reference.

Court judgements are assessed based on the judicial training optimization needs to ensure relevance and quality in the application of the ECHR and the case-law of the ECtHR, and to determine the influence of the judges' participation in judicial trainings.

All types of judgements, including procedural rulings, are subject to assessment. The previous analysis has shown that if the assessment is narrowed down to the final judgement (exclusively qualifying merits), it fails to take account of the individual aspects of judicial proceedings, for which the legal stance of the ECtHR can serve as an important factor in improving the quality of judgments (e.g. restricting access to courts when proceedings are started, decisions of investigative judges, etc.).

A three phase training delivery (in 2014, 2015 and 2016) does not envisage modification of assessment indicators and forms. In addition, a unified approach to the sampling of judges and judgements is employed.

## SECTION 1. SAMPLING OF JUDGES AND JUDGEMENTS

For each phase, the sampling of judges and the sampling of judgements are carried out independently. Then, judges and judgements sampling methodologies are rendered for the first and the second phases of assessment (first training phase – 2014, second training phase – 2015). Similar procedure applies to sampling at the third phase.

### SELECTION OF JUDGES

#### STEP 1. Determining the sampling frame

According to the Terms of Reference, the sampling frame for the first phase of the assessment includes all judges who underwent training before 1st December 2015 (e.g. 660 persons underwent trainings in 2014–2015 within the Project).

#### STEP 2. Sampling

According to the Terms of Reference and consultation with the Project, the optimum sample size is 150 judges, which constitutes a representative sample in line with the standard criteria for statistical (social) studies provided that the random sampling requirement is met.

*Note: With this in mind, it would be appropriate to opt for a random (systematic) sampling as a method (technique) of selection from the list of participants, using 5 as a sampling step. Considering that sampling is based on the alphabetical list of participants, this choice is consistent with the principle of randomness.*

## SELECTION OF JUDGEMENTS

Selection of judgements is carried out with respect to each judge included in the sample. The selection procedure is as follows.

### STEP 1. Completing “Judge” Section of the Expert Assessment Form

The Expert Assessment Form (hereinafter referred to as “the Form”, see Annex below) contains a “Judge” section, which is completed based on the sampling list and calculated based on data from the Unified State Register of Court Judgements (hereinafter “the Register”) in line with the algorithms set out below. **The purpose is to select court judgements subject to expert assessment. Said selection is carried out at the “before training” and “after training” phases.** In theory, each judge’s sample may include the number of judgements that corresponds to the resource capacity of a research (number of experts involved, timeframes, etc.). As per the Terms of Reference of this Project, 6 judgements were identified as a minimum possible quantity for analysis.

*Note: The actual sample may vary as there might be no judgements referring to the ECHR whatsoever, while some judges might not have the mandate<sup>2</sup> (in this case they should be excluded from the sample and replaced by other judges adjacent on the list).*

### STEP 2. Determining the number of judgements at the “before training” phase

The following search mode is set in the Register’s search system:

- timeframe – 12 months before the date of first participation in the training;
- type of judgement – decree, ruling, sentence, order, separate order;
- judge’s status – single judge or presiding judge (judge-rapporteur).

The search result (judgements and their number) is recorded as the baseline indicator for participation in judicial proceedings (with no contents specified, i.e. with no breakdown by types of judgement).

### STEP 3. Determining the number of judgements at the “before training” phase containing references to the ECHR or to the case-law of the ECtHR

The Register’s search system is used, whereby a keyword search, i.e. “Convention”, “European Court”, “European Convention”, is set in respect of the number of judgements identified within a respective timeframe. The list of judgements obtained then undergoes a relevance check (whereby judgements containing references to other conventions, e.g. Convention on the Rights of the Child, are excluded).

The search result (list of judgements and their number) is recorded as the number of judgements with reference to the ECHR.

It is also possible to calculate a share of judgements with reference to the ECHR and the case-law of ECtHR as a percentage of the total number of judgements. However, this indicator turned out to be insufficiently information-bearing and is not subsequently used.

<sup>2</sup> Mandate of a number of judges was not extended due to various reasons connected to the justice sector reform.

#### STEP 4. Determining the number of judgements at the “after training” phase

The following search mode is set in the Register’s search system:

- timeframe – 12 months after the date of first participation in the training;
- type of judgement – decree, ruling, sentence, order, separate order;
- judge’s status – single judge or presiding judge (judge-rapporteur).

The search result (judgements and their number) is recorded as the baseline indicator for participation in judicial proceedings (with no contents specified).

#### STEP 5. Determining the number of judgements at the “after training” phase containing references to the ECHR or the case-law of the ECtHR

The Register’s search system is used, whereby a keyword search, i.e. “Convention”, “European Court”, “European Convention”, is set in respect of the number of judgements identified within a respective timeframe. The list of judgements obtained then undergoes a relevance check (whereby judgements containing references to other conventions are excluded).

The search result (list of judgements and their number) is recorded as the number of judgements with reference to the ECHR.

It is also possible to calculate a share of judgements with reference to the ECHR and ECtHR case-law as a percentage of the total number of judgements. However, this indicator turned out to be insufficiently information-bearing and is not subsequently used.

#### STEP 6. Determining the sample of judgements at the “before training” phase

According to the Terms of Reference of the Project, the in-sample number of judgements for each judge should be 3. Selection is based on the list generated subsequent to Step 2 and Step 3. Selection is carried out in the form of random (systematic) sampling. Sampling step depends on the total number of judgements. Based on the condition that average quantity of such judgements does not exceed 10, the expert is tasked not only with a mere systematic (mechanical) selection of every 2/3/4 judgement, but with checking all the list of judgements as well.

Selected judgements are then checked for relevance to the assessment tasks. No systematic sampling applies for a large number of single-type judgements with reference to the ECHR. Other judgements (if any) containing references to the ECHR are included in the subsample.

#### STEP 7. Determining the sample of judgements at the “after training” phase

According to the Terms of Reference of the Project, the in-sample number of judgements for each judge should be 3. Selection is based on the list generated subsequent to Step 4 and Step 5. Selection is carried out in the form of a random (systematic) sampling. Sampling step depends on the total number of judgements. Based on the condition that average quantity of such judgements does not exceed 10, the expert is tasked not only with a mere systematic (mechanical) selection of every 2/3/4 judgement, but with checking all the list of judgements as well.

Selected judgements are then checked for relevance to the assessment tasks. No systematic sampling applies for a large number of single-type judgements with reference to the ECHR. Other judgements (if any) containing references to the ECHR are included in the subsample.

## JUDGEMENTS SAMPLING EXAMPLES

### 1) XXX, Judge at Poltava Court of Appeal

(underwent training on 10 November 2014; № 1 in the list of participants).

#### *“Before training”*

- Total number of judgements at the “before training” phase (November 2013 – 10 November 2014) – **307**;
- Total number of judgements at the “before training” phase (November 2013 – 10 November 2014) containing references to the ECHR and the case-law of the ECtHR – **6 (or 2.0%)**;
- **Sample for analysis: with reference – every 2nd judgement (with the relevance check, for example replacement of mass procedural judgements, etc.).**

#### *“After training”*

- Total number of judgements at the “after training” phase (10 November 2014 – 10 January 2016) – **501**;
- Total number of judgements at the “after training” phase (November 2014 – 10 January 2016) containing references to the ECHR and the case-law of the ECtHR – **24 (or 5.0%)**;
- **Sample for analysis: with reference – every 8th judgement (with the relevance check, for example replacement of procedural judgements, etc.).**

### 2) XXX, Judge at Kovel Interdistrict Court, Volyn Oblast

(underwent training in September 2015; № 2 in the list of participants).

#### *“Before training”*

- Total number of judgements at the “before training” phase (1 September 2014 – 1 September 2015) – **891**;
- Total number of judgements at the “before training” phase (1 September 2014 – 1 September 2015) containing references to the ECHR and the case-law of the ECtHR – **n/a**;
- **Sample for analysis: 0.**

#### *“After training”*

- Total number of judgements at the “after training” phase (1 September 2015 – 10 January 2016) – **317**;
- Total number of judgements at the “after training” phase (1 September 2015 – 10 January 2016) containing references to the ECHR and the case-law of the ECtHR – **1 (or 0.03%)**;
- **Sample for analysis: with reference – 1 judgement.**

### 3) XXX, Judge at Donetsk District Administrative Court

(underwent training on 15 May 2015; № 3 in the list of participants).

#### *“Before training”*

- Total number of judgements at the “before training” phase (15 May 2014 – 15 May 2015) – **445**;
- Total number of judgements at the “before training” phase (15 May 2014 – 15 May 2015) containing references to the ECHR and the case-law of the ECtHR – **n/a**;
- **Sample for analysis: 0.**

#### *“After training”*

- Total number of judgements at the “after training” phase (15 May 2015 – 10 January 2016) – **551**;
- Total number of judgements at the “after training” phase (15 May 2015 – 10 January 2016) containing references to the ECHR and the case-law of the ECtHR – **1 (or 0.02%)**;
- **Sample for analysis: with reference – 1 judgement.**

The procedure referred to hereinabove results in the generation of **judge’s file**, containing:

- a) Expert Assessment Form (Annex) with a completed “Judge” Section.
- b) Up to 6 texts of court judgements selected following the sampling procedure and subject to assessment. For added convenience, only a court judgement’s particulars (sufficient for its search in the Register) rather than its full text can be rendered.

## SECTION 2. EXPERT ASSESSMENT OF COURT JUDGEMENTS

The **judge’s file**, forming the basis for reflecting the expert assessment results, is handed out to an expert. Court judgement analysis envisages the expert’s response to all relevant fields of the assessment form. “Comments” section should contain “quotes from the judgement” and expert’s opinions and comments.

Assessment results (expert’s answers to questions contained in the assessment form and his or her comments) should be included in the special assessment forms (see Annex):

- Section 2 of the Form (judgements with reference to the ECHR).

Completed forms are then entered into the database (in MS Excel format).

# Annex

## COURT JUDGEMENT ASSESSMENT FORM

### (in database format)

#### JUDGE

1. Full name \_\_\_\_\_

2. Sex

1. Male
2. Female

3. Court

1. Local Court of General Jurisdiction
2. General Court of Appeal
3. District Administrative Court
4. Administrative Court of Appeal
5. Supreme Administrative Court
6. Supreme Specialised Court for Civil and Criminal Cases
7. Other \_\_\_\_\_

*Note: "Other" includes Commercial Courts as certain judges from amongst developers/trainers represented these courts in particular. They were not included in the statistical analysis due to their small number.*

4. Oblast/city

- |                                  |                            |                     |                         |
|----------------------------------|----------------------------|---------------------|-------------------------|
| 1. Autonomous Republic of Crimea | 7. Zhytomyr Oblast         | 14. Luhansk Oblast  | 21. Cherkasy Oblast     |
| 2. City of Kyiv                  | 8. Zakarpattia Oblast      | 15. Mykolaiv Oblast | 22. Chernihiv Oblast    |
| 3. Vinnytsia Oblast              | 9. Zaporizhzhya Oblast     | 16. Odesa Oblast    | 23. Chernivtsi Oblast   |
| 4. Volyn Oblast                  | 10. Ivano-Frankivsk Oblast | 17. Poltava Oblast  | 24. Kharkiv Oblast      |
| 5. Donetsk Oblast                | 11. Kyiv Oblast            | 18. Rivne Oblast    | 25. Kherson Oblast      |
| 6. Dnipropetrovsk Oblast         | 12. Kirovohrad Oblast      | 19. Ternopil Oblast | 26. Khmelnytskyi Oblast |
|                                  | 13. Lviv Oblast            | 20. Sumy Oblast     |                         |

5. Training status

1. Participant
2. Developer/trainer

6. Monitoring phase

1. First (2014)
2. Second (2015)
3. Third (2016)

7. Total number of judgements before training (for the period of assessment) (delivered as a single judge or presiding judge (judge-rapporteur))

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8. Number of judgements (containing references to the ECHR and the case-law of the ECtHR) subject to the assessment

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9. Total number of judgements after training (delivered as a single judge or presiding judge (judge-rapporteur))

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10. Number of judgements (containing references to the ECHR and the case-law of the ECtHR) subject to the assessment

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## BLOCK 2. ASSESSMENT OF JUDGEMENTS CONTAINING REFERENCES TO THE ECHR AND THE CASE-LAW OF THE ECtHR

### 1. Judgement sequential number

### 2. Judgement No.

### 3. Assessment phase

- 1) Before training
- 2) After training

### 4. Case type

- 1) Administrative
- 2) Civil
- 3) Concerning administrative offence
- 4) Criminal
- 5) Commercial

### 5. Type of judgement

- 1) Sentence
- 2) Ruling
- 3) Order
- 4) Decree
- 5) Separate order

### 6. Case complexity

- 1) Standard (mass or typical) case
- 2) Typical case involving certain non-standard aspects (e.g. minor as a victim, multiple episodes, witnesses, etc.)
- 3) Non-standard or landmark case
- 4) Other

*Note! If "Other" is selected, please specify.*

### 7. Reason for reference to the ECHR and the case-law of the ECtHR

- 1) Own initiative
- 2) Response to the parties' arguments
- 3) Both the parties and the court referred to the ECHR and the case-law of the ECtHR

### 8. Nature of reference to the ECHR and the case-law of the ECtHR (overall assessment). *You may select up to three answers.*

- 1) The ECHR is referred to in general (name or name and general explanation)
- 2) Reference to specific article(s) of the ECHR without further explanation
- 3) Reference to specific article(s) of the ECHR and explanation of its importance for the case
- 4) Reference to specific ECtHR judgement(s) without further explanation
- 5) Reference to specific ECtHR judgement(s) and explanation of its importance for national court judgement rationale
- 6) Use of ECtHR legal opinion expressed in its judgement without reference to specific judgements
- 7) Mentioning of the parties' reference to the ECHR and the case-law of the ECtHR (explaining the reasons for acceptance/rejection of the parties' arguments)

### 9. Arguments that are based on the provisions of the ECHR or the case-law of the ECtHR pertain to:

*You may select up to two answers.*

- 1) Subject-matter of a case
- 2) Certain procedural aspects
- 3) General provisions regarding legal proceedings
- 4) There is no evident connection with the subject-matter of a case

### 10. Which articles of the ECHR does a national court refer to? *Please list all of them.*

**11. Which ECtHR judgements does a national court refer to?** *Please list all of them.*

**12. Assessment of the overall substantiation of reference to the ECHR (irrespective of reference to a particular article)**

*You may select up to three answers.*

- 1) Formal reference having no direct connection with the subject-matter of or circumstances in a case (“unnecessary reference”)
- 2) Reference of a general nature, which is not essential for judgement rationale and final decision (“declarative reference”)
- 3) Reference determining a source of law (general principles)
- 4) Reference which is fundamental to the rationale behind the judgement
- 5) Erroneous interpretation of connection between the ECHR and subject-matter of a case
- 6) Other

*Note! If “Other” is selected, please specify.*

**13. Provide comments to Item 12 where necessary** (pay attention to whether there is a real need in such a reference). If the reference was made by error, please provide the rationale and respective quotes from the judgement.

**14. Assessment of substantiation of reference to specific ECtHR judgements or legal opinions of the ECtHR**

*You may select up to three answers.*

- 1) Formal reference having no direct connection with the subject-matter of or circumstances in a case (“unnecessary reference”)
- 2) Reference of a general nature, which is not essential for judgement rationale and final decision (“declarative reference”)
- 3) Reference constituting an additional rather than essential argument (i.e. there are similar provisions in the national legislation and case-law)
- 4) Reference constituting both additional and essential argument (i.e. new interpretation is added to national legislation and case-law)
- 5) Reference constituting the main argument (absence of such reference in a judgment results in poor substantiation; e.g. a reference closes the legislative gap or resolves a collision)
- 6) Erroneous reference (a judgement offers an erroneous rationale)
- 7) Manipulative reference (in order to strengthen argumentation of a judgement, but it has nothing to do with the legal opinion expressed in the ECtHR’s judgement)
- 8) Other

*Note! If “Other” is selected, please specify.*

**15. Provide comments to Item 14.** (It is **mandatory** to indicate the similarity of **legal relationships** for a case). If the reference is erroneous or manipulative, provide arguments and relevant quotes from the judgement.

**16. Method of reference to the ECHR and the case-law of the ECtHR**

- 1) Standard method (standard for a judge, court or court jurisdiction)
- 2) Self-selection of judgement and its interpretation (connection with subject-matter of a case)
- 3) Other

*Note! If “Other” is selected, please specify.*

**17. Provide comments to Item 16.** (Please pay attention that a clichéd judgement must be explained as to a source of such cliché, i.e. a judge’s own format, recommendation/legal opinion of Supreme Court/position of colleagues, etc.).

**18. Satisfactory form of reference to the ECHR or ECtHR judgement** (correctness and completeness of reference to the ECHR, judgement name, etc.)

- 1) Correct
- 2) Generally correct but there are some inaccuracies
- 3) Incorrect

**19. Provide comments to Item 18 if necessary.** *Specify inaccuracies identified, if any.*